No. 1414

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

RICHARD O. TILTON, WILLIAM A. BERMAN, THOMAS CONTER, FLOYD E. LOCKIE, RAYMOND O. BOLSTAD, MARK R. BADER, ARTHUR J. CORBITT, RICHARD R. OLBERDING, PATRICK H. COLLITON, KENNETH D. MILLER, ROBERT E. MUNK, JACK A. WALLER, KENNETH A. BYE, ROBERT J. HAYES, HOWARD J. VERTEKE, and HOMER C. HALL, *Petitioners*,

v.

THE COWLES PUBLISHING COMPANY, a Corporation, *Respondent*.

On Petition for Writ of Certiorari to The Supreme Court of the State of Washington

---

RESPONDENT'S BRIEF IN OPPOSITION

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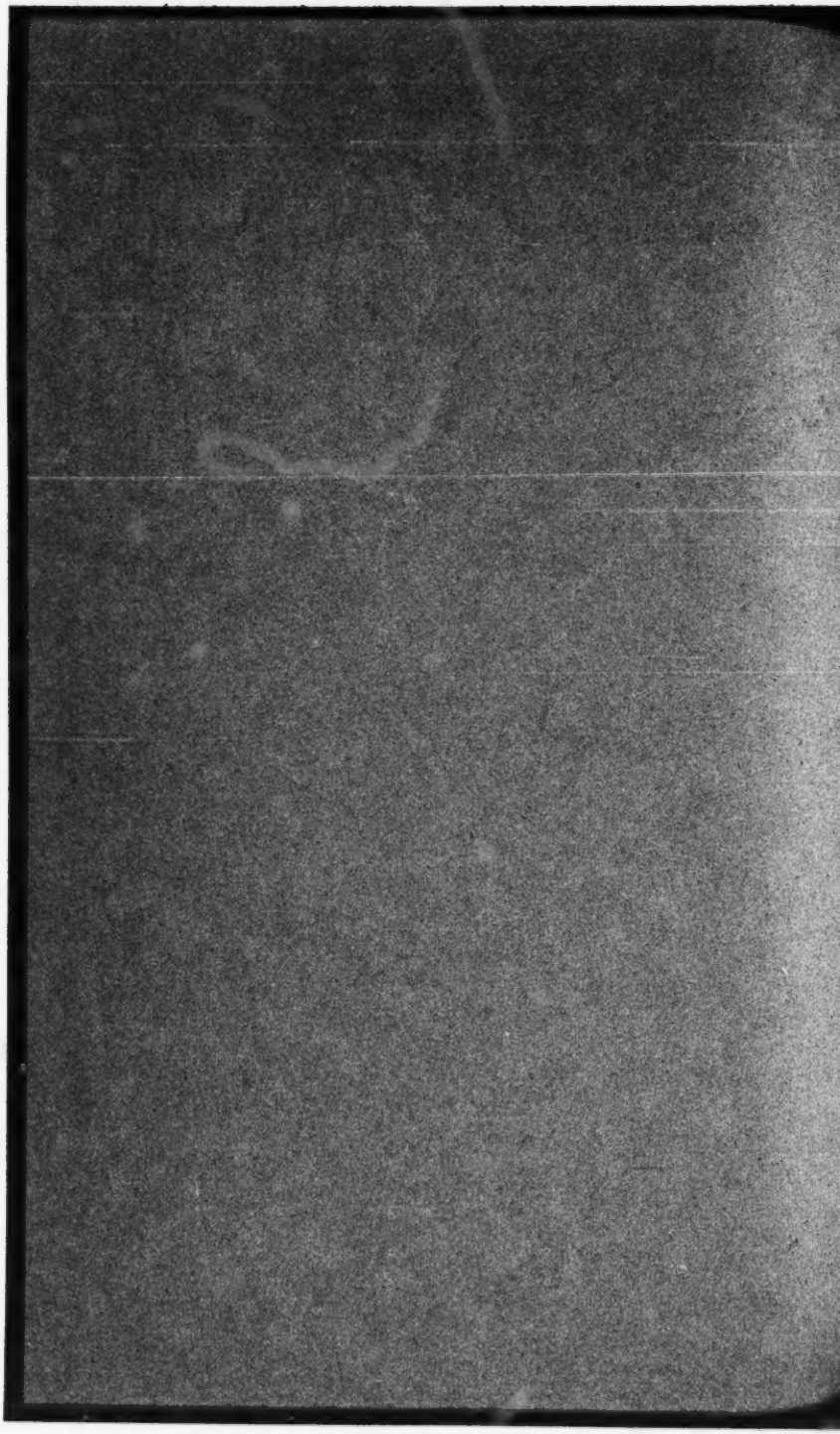

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OPINION BELOW

The opinion of the Supreme Court of the State of Washington (Pet. App. 1a-34a) is reported at 76 W.D.2d 875 (1969).

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on September 18, 1969. The petition for a rehearing was denied on December 18, 1969. On April 13, 1970, the petition for writ of certiorari was filed. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether there was sufficient evidence on the question of malice under the *New York Times* v. *Sullivan* rule to submit the case to the jury.

STATEMENT

Petitioners' Statement of the Case does not set out the facts out of which this lawsuit grew with sufficient clarity to allow this Court to understand the issues involved. Consequently, Respondent will make its own statement of the facts in this lawsuit.

In October 1965, a political campaign was being waged in Spokane, Washington. A citizens group entitled "Committee of Interested Taxpayers and You," and commonly called "CITY," was trying to change the Spokane City Charter (St. 92-93). The charter change, to be voted on by Spokane voters in November, would replace the city manager form of government with a new government referred to as the "strong mayor government." (St. 42-43). The attempt to change the form of city government by vote brought on a "red hot political campaign." (St. 43, lines 12-15).

The editorial policy of the respondent newspaper, The Spokesman-Review, opposed the charter change. (St. 21-22). Many of Spokane's city policemen and firemen backed the CITY group and the charter change, but some members of the Fraternal Order of Police (the police union), including Assistant Police Chief E. W. Par-

sons and Police Department Secretary W. W. Natwick, were opposed to any use of police union funds in support of the charter change campaign. (St. 440-441; Deft. Ex. 5).

Police Chief Clifford Payne heard a rumor (later proved to be true) that the executive committee of the Spokane Public Safety Council had voted to turn over $5,300 in funds held by the treasurer of the police union to the Public Safety Council for use by CITY in paying for advertising in support of the charter change. (St. 146, 416, 420-421). The $5,300 had been collected by a $1.00 a month withholding from policemen's pay checks and paid by the Spokane City Treasurer to the treasurer of the police union. (St. 138, 164, 180-181).

The Spokane Public Safety Council was a joint organization of policemen and firemen to which every policeman and fireman belonged, but its affairs were managed by an executive council of 22 members, half policemen and half firemen. Each of the petitioners herein was a member of the executive committee. (St. 118).

When Police Chief Payne heard that $5,300 had been paid by the treasurer of the Police union to the treasurer of the Public Safety Council for use by CITY in the strong mayor charter change campaign, Payne asked Thomas Curtiss, secretary-treasurer of the police union, if $5,300 had been paid to the Public Safety Council. Curtiss said the money had been paid. (St. 416). Chief Payne asked Curtiss for minutes of the last meeting of the police union

so he could determine if the members of the union had voted to transfer the $5,300 to the Public Safety Council, but Curtiss refused to let Payne see the minutes of the last police union meeting. (St. 416). In fact, the transfer had not been voted upon or authorized by a vote of police union members, in conformity with the bylaws of the police union. (St. 171).

With the approval of the police chief, Assistant Police Chief Parsons and Police Secretary Natwick talked to two firms of attorneys, Hamblen, Gilbert & Brooke and Hennessey, Curran, Bentley & Kelly, who drafted a complaint and other pleadings seeking an injunction to restrain the defendants in the Parsons-Natwick lawsuit (including all petitioners here) from using police union funds in the political campaign. (Deft. Ex. 5; St. 106, 109).

Jack Roberts, city hall reporter for respondent newspaper, heard on October 20, 1965, that a lawsuit might be brought to prevent the use of police union funds in the charter change campaign. (St. 43-44). On October 23, 1965, on a tip from Police Chief Payne, Roberts went to the offices of Hamblen, Gilbert & Brooke and was handed signed copies of the complaint and other pleadings by Fred W. Gilbert. (St. 61-62). Gilbert was a reputable attorney, and a member of a substantial and respected law firm. (St. 72-73).

Roberts took the lawsuit papers to his office and wrote a news story, based on the facts alleged in the complaint, which had been verified under oath by Assistant Police

Chief Parsons, and on the other lawsuit pleadings he received. (St. 63-65). Roberts did not phone or otherwise contact any of the defendants named in the lawsuit, some of whom he knew, to check to see if the facts alleged in the lawsuit were true. (St. 65-66). Roberts, a reporter with 22 years of experience as a newspaperman, testified that the general practice in the newspaper business is that a reporter never does try to check the information in a complaint or other papers in a lawsuit to determine if the facts alleged are true or false. (St. 91-92). No contrary evidence was offered.

At a hearing on a motion for a temporary restraining order, the judge in the Parsons-Natwick suit ruled that the $5,300 was not police union money but was money held by the treasurer of the police union in trust for the Public Safety Council, and hence there was no violation of the police union bylaws requiring a vote of the union on transferring the $5,300. (St. 8-9).

The petitioners herein, 16 of the 23 persons named as defendants in the Parsons-Natwick lawsuit and named in the news story Roberts wrote based on the lawsuit papers, then sued the newspaper for damages totaling $2,000,000.00, ($125,000 a piece for 16 plaintiffs). (Tr. 3). During the trial of this suit petitioners contended that it was false that they had made an "unlawful" or "illegal" or "ultra vires" transfer of police union funds, saying the $5,300 belonged to the Public Safety Committee. (St. 156, 171). Respondent newspaper asserted that the $5,300 was in fact police union money. A great deal of testimony was

taken on the issue of whether the $5,300 was police union funds or Public Safety Council funds held by the police union treasurer.

The court instructed the jurors that if they found the $5,300 transferred "belonged to the Spokane Public Safety Council, you will find that the news article was false in saying otherwise." (Instruction 17, St. 518). The jury found for petitioners, thus finding the money was not police union money, and therefore the allegations in the Parsons-Natwick lawsuit were false, and the story written by Roberts was also false.

The court also instructed the jurors that the news story was published on "a privileged occasion, and under a qualified privilege" (Instruction 18, St. 518-519) but that if the story was published "with knowledge of its falsity or in reckless disregard of whether it was false or not," the publication would be malicious and their verdict should be for plaintiffs. (Inst. 9, St. 515).

The jury returned a verdict of $13,000 damages per plaintiff, or a total of $208,000. (St. 521a). The newspaper moved for judgment notwithstanding the verdict, or for a new trial, or a reduction of the verdict as excessive. (Tr. 20-22). Counsel for respondent argued that there was insufficient evidence—in fact no evidence—of malice sufficient to meet the test of the New York Times case and to take the case to the jury. (St. 522 et seq).

The trial court ruled there was sufficient evidence of

malice to submit the case to the jury, saying:

> "In short, I have concluded that a high regard for the writers of complaints and affidavits does not as a matter of law preclude the issue of recklessness. *Here there just was no other inquiry made, although Mr. Roberts was well acquainted with the individuals who had the information readily at hand.*" (St. 635; italics ours).

The court entered an order granting a new trial unless petitioners would accept a reduction of their jury awards to $2,500 each. They rejected the award and appealed from the resulting order granting a new trial to respondent newspapers. (Tr. 32-33; 40). Respondent cross-appealed. (Sup. Tr. 1).

The Washington Supreme Court, on respondent's cross-appeal, held there was insufficient evidence of malice under the New York Times case rule to take the case to the jury, saying, in part:

> "To require defendant, in effect, to pretry this lawsuit under these circumstances before reporting the allegations of the complaint would seriously limit the free dissemination of news and ideas guaranteed by the First Amendment. We therefore hold that the evidence of actual malice with respect to reporting these allegations was constitutionally insufficient to take this issue to the jury." 76 W.D. 891.

Petitioners then applied to this court for a writ of certiorari to the Washington State Supreme Court, seeking to review that court's ruling that there was insufficient evidence of malice to support the jury verdict.

ARGUMENT

This case presents an example of a petition for a writ of certiorari which should *not* be granted because there is no Federal question presented which conflicts with the decisions of this Court and because the jurisdiction of this Court has not been properly invoked. In essence, the petitioner simply seeks to persuade this Court to investigate the entire trial record to determine whether the Supreme Court of the State of Washington correctly decided that insufficient evidence of the question of malice under *New York Times v. Sullivan* was presented to take the case to the jury. No new Federal question is presented, or even suggested.

Petitioners' Question No. 1

Petitioners claim that a newspaper reporter is guilty of "reckless disregard" of truth or falsity if he fails to investigate or check information "known to him for ten days prior to the publication . . ." This requires this Court first to re-examine the facts to see if the reporter did know the information he published "for ten days". The record shows he received a "tip" on Wednesday, October 20, 1965, that a lawsuit might be brought to attempt to stop the transfer of Spokane police union funds to a citizen's group for use in a pending election campaign which sought to change the Spokane City Charter from a city manager form to a "strong mayor" form. (St. 49-50). The reporter, Jack Roberts, received a copy of a summons and complaint and an affidavit in a suit by the assistant chief of police and the police department secretary against 22 individuals

(including all of petitioners) three days later, (St. 61-62) on October 23, 1965, and wrote the story sued on within the next hour and a half or two hours, taking from 30 to 45 minutes to write the story. (St. 65). Until he received the papers in the lawsuit, he did not know what facts were being charged in the lawsuit. Consequently, petitioners' factual assertion that the reporter knew the facts for ten days before the publication of the story, and hence was guilty of "reckless disregard" for truth for failure to check the accuracy of the facts in the lawsuit is not supported by the record. Additionally, this court has ruled on a number of occasions that failure to check the facts of news stories received from supposedly reliable sources does not constitute malice or "reckless disregard" for the truth of facts published. *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964); *Associated Press v. Walker*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 19 L.Ed.2d 248, 88 S.Ct. 197 (1967); *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968).

The trial court erred in ruling that there was a duty on the reporter to investigate to verify the truth of the facts in the complaint and affidavit in the lawsuit papers. No evidence supported the court and jury's conclusion that there was such a duty. The only evidence was that such an investigation is never made in the newspaper business. (St. 91-92). The courts, which know first hand the difficulties which attend the separation of truth from false-

hood, should certainly never impose on a newspaper the duty to search out and find the truth in order to avoid a charge of "reckless disregard" for truth or falsity. Under the circumstances of this case, the Washington State Supreme Court had a duty, imposed by the rules laid down by this court, to rule that failure to make an independent check of the truth of the facts set out in the lawsuit was not "reckless disregard for truth or falsity." The Washington Supreme Court discharged that duty. *New York Times Co. v. Sullivan, supra.*

Petitioners' Question No. 2

Petitioners ask "whether publishing an article known to be false constitutes actual malice." Obviously, the answer to the question is "yes", but the question begs this Court to examine the trial court record to see if Respondent published an article which it knew to be false, or which its reporter, Jack Roberts, knew was false. The Washington State Supreme Court, after examining the record, said, not just once, but twice, that there was no evidence in the record that the defendant's reporter knew that any of the allegations in the lawsuit papers were untrue or that he knew that any facts or charges in the story he wrote were untrue. The court said:

> "There is no evidence that Mr. Roberts had actual knowledge that any of the facts or charges related in the story were untrue." 76 W.D.2d at 878.

Later the opinion said:

> "There is no evidence in the record that Mr. Roberts, the reporter, actually knew that these allegations (in

> the lawsuit) were false. Rather, the question is whether he reported the allegations with reckless disregard of their truth or falsity." 76 W.D.2d at 889.

The dissenting opinion did not discuss the claim that the defendant "knew" the publication was false, as the dissent was based on the proposition that the failure to investigate the facts justified the jury in finding that the story was "published with reckless disregard for its truth or falsity." 76 W.D.2d at 900.

Petitioners' Question No. 2 asks this Court to re-examine the facts in the record in the trial court and to reverse the Washington State Supreme Court by finding that it *should* have found that the defendant newspaper and its reporter "knew" it was publishing false facts when it published a news story based on the pleadings in a lawsuit by the assistant chief of police and the police department secretary. The Court should decline the invitation to re-examine the facts on this issue. Additionally, Petitioners' insistence that Respondent's reporter "knew" his story was false because the jury found it reported a crime when only a civil lawsuit charging "unlawful" appropriation of police union money had inspired the news story is reminiscent of the reasoning of the Court of Appeals of Maryland in *Bresler v. Greenbelt Cooperative Publishing Assn., Inc.*, 253 Md. 324, 252 A.2d 755. That type of reasoning was clearly rejected by this court in *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 38 L.W. 4390 (May 18, 1970).

Petitioners' Question No. 3

This question raises a wholly factual issue by asking:

> "Whether or not the opinion of the Washington State Supreme Court can stand when it is patently *based on an erroneous factual conclusion,* assumed as true, but which is contrary to a proper determination made by the trier of the facts in this case." (P. p. 3). (Italics ours).

This question would have this Court re-examine the facts found against Petitioners by the state court, on grounds that the jury determination is binding on the Washington State Supreme Court. First, this Court should follow its usual practice of not re-examining factual decisions made by the highest appellate court of a state. Second, the claim that jury determinations in libel cases are not to be re-examined by the state's highest appellate court on a challenge to the sufficiency of the evidence to uphold the jury finding of "reckless disregard of truth or falsity," flies in the face of contrary rulings by this court in *New York Times v. Sullivan, supra; Associated Press v. Walker,* 388 U. S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094; *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed. 2d 197. Petitioners argument is phrased thus:

> "It seems little argument is necessary to point out that an opinion based upon a patently erroneous statement of facts cannot stand." (Petition, p. 11).

This argument is simply an invitation for this court to re-examine the entire factual record and to reverse the court below on a wholly factual basis. *See General Talking Pictures Corp. v. Western Electric Co.,* 304 U. S. 175

(1938). Though this Court has jurisdiction to examine the record of the court below to determine the sufficiency of the facts in a First Amendment case when necessary to do so, there is absolutely no showing made in this case which would justify reversing the facts as found by the Washington State Supreme Court. *Pennekamp v. State of Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295; *New York Times v. Sullivan, supra; Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, supra.*

It is not disputed in this case that the news story published was an accurate and truthful report of the contents of the complaint and other papers prepared for the purpose of commencing a lawsuit, which was promptly commenced. Neither the majority opinion nor the dissenting opinion in the Washington State Supreme Court suggested that the news story was not a reasonably accurate report of the pending commencement of a lawsuit. Indeed, the Petitioners concede this fact. Their compaint is that the story was published before the lawsuit was filed. They say:

> "Had the story reported on an action that had been *filed* with the clerk of the Spokane County Superior Court, the article would have a judicial privilege and this action would never have been commenced." (Italics by Petitioners). (P. 6)

Petitioners seem to believe that the privilege to publish reasonably accurate reports of "judicial proceedings" is much stronger than the "public interest" privilege created by the New York Times case. There is no authority for that belief.

Petitioners ask this Court to reverse the facts found by the Washington State Supreme Court on a claim that Respondent newspaper acted with "reckless disregard for truth or falsity," as a jury apparently believed, by failing to conduct a personal investigation to find out if the facts in a complaint by an assistant chief of police were true or false. Petitioners wholly misconceive the meaning of and the rationale behind the "public interest" privilege created by the *New York Times* case and its progeny.

The touchstone to the privilege created by the *New York Times* case, *supra*, is not whether the libel suit plaintiff is a "public official," nor whether he is a "public figure," but whether the incident out of which the publication naturally grows is in fact a matter of "public interest." When the story grows out of a matter of great public interest, such as involved in the case at bar, in which the real issue was the propriety of policemen and firemen using union funds to affect the outcome of an election to change the form of city government, it is immaterial whether the plaintiffs are either "public officials" or "public figures." They were inextricably bound up in an event of great public interest, which, in and of itself created the "public interest privilege" claimed by the Respondent newspaper in this case.

The Washington State Supreme Court held that the Petitioners were not "public officials" but were "public figures." That ruling was obviously correct. But even beyond that, the rules laid down by this court in the *New York Times* case and its progeny make it clear that, whether

it is called a "public figure privilege" or a "public interest privilege," the Respondent in this case did have a privilege which the Petitioners failed to overcome. There was no evidence of malice to overcome the privilege Respondent was entitled to in this case, as the Washington State Supreme Court clearly held.

Petitioners' Question No. 4

> "Whether an individual by being a *member* of an organization that inserts itself into a political controversy becomes a 'public figure' within the meaning of the New York Times rule as interpreted." (Pet., p. 3) (Italics ours).

The record shows that the Petitioners, rather than being just "members" of the Spokane Area Public Safety Council – the organization which inserted itself into the political election controversy – were members of its executive committee which made the decision to "insert" the organization into the political battle raging. As the Washington State Supreme Court put it:

> "The alleged libel in this case related to plaintiffs' use of funds from the Police Lodge *in their activities as members of the executive committee* of the Spokane Area Public Safety Council . . ." 76 W.D.2d 884.

However, more importantly, the record shows clearly that the Petitioners have waived any right to raise the issue that they were not "public figures" within the scope of the New York Times rule. Petitioners did not raise in the Washington State Supreme Court the claim that they were not "public figures" by failing to assign error to the

trial court's ruling that they were "public figures," and by failing to assign error to or to object to the instructions given which told the jury that they were "public figures." The Washington Supreme Court said:

> "Plaintiffs assign error to the order granting a new trial or reducing the verdicts and to the court's refusal to enter judgment on the verdict." 76 W.D.2d at 881.
>
> "Under current decisions of the United States Supreme Court the initial question to be determined in cases of this nature is whether plaintiffs are public officials or public figures as those terms are defined in *New York Times* and subsequent cases. Although *the ruling by the trial court that these plaintiffs were public figures is not challenged here,* we include a discussion of the matter in order that the issues of malice and privilege may be placed in proper focus." 76 W.D.2d at 883-884. (Italics ours).

The fact that the Washington State Supreme Court discussed the "public figure" issue not raised by the Plaintiffs-Petitioners on appeal to that court, and concluded that in fact they were "public figures" does not obscure the fact that Petitioners have waived any right to urge that issue in this court.

Additionally, as in the *Greenbelt Cooperative Publishing Assn., Inc.*, case, *supra,* Petitioners here did not even make a showing that Respondent newspaper was "guilty of any 'departure from the standards of investigation and reporting ordinarily adhered to by publishers,' . . ." 38 L.W. at 4392. In fact, the reporter, Roberts testified that the procedure he followed in writing the news story about the complaint in the civil lawsuit was the "general prac-

tice" throughout the newspaper business, because newspapers "just do not check behind information in a legal complaint." (St. 92). Petitioners offered no evidence to the contrary. So, even if the constitutional standards are less for "public figures" such as Petitioners than for "public officials," their proof in this case would still be insufficient to amount to constitutional malice.

JURISDICTION NOT SHOWN

(1) Jurisdictionally, the Petition for Writ of Certiorari fails to set out any facts which would bring it under 28 U.S.C. §1257 (3). The Petition (p. 2) simply says: "Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3)." Under Section 1257 (3), this Court may review the final judgment of the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Neither in the jurisdictional paragraph on page 2 of the Petition, nor anywhere else therein, does the Petition make any mention of what "right, privilege or immunity" was "specially set up or claimed under the Constitution" by the Petitioners herein, either in the trial court, or in the Washington State Supreme Court, or in this Court.

Petitioners give lip service to 28 U.S.C. §1257 (3) by referring to it as the source of their claimed jurisdiction (p. 2) and by reciting (on p. 3) that "The constitutional provisions involved are the First and Fourteenth amendments to the United States Constitution . . ." No "right,

privilege or immunity" either "set up or claimed" by Petitioners herein at any stage of the trial or in the Washington State Supreme Court is mentioned or referred to at any place in the Petition.

(2) Rule 19(a) indicates that this Court will consider cases in which a state court has either (1) "decided a federal question of substance not theretofore determined by this court," or (2) has decided a federal question "in a way probably not in accord with applicable decisions of this court." The petition in this case disposes of Rule 19 by the simple device of ignoring it. The Petition never mentions Rule 19, does not claim that this case involves a "federal question of substance" not yet determined by this court, and does not urge, or even intimate, that the decision of the Washington State Supreme Court in this case was "probably not in accord" with any decision of this court. In fact, the words "federal question" are conspicuously absent from the Petition for Writ of Certiorari in this case. The words "federal question" or "federal questions" are not used anywhere in the Petition. Petitioners urge to this court the same kind of argument, largely factual, as they urged unsuccessfully on the Washington State Supreme Court.

(3) Rule 23(1) (f) requires a Petition for review of a state court judgment, such as this, to set out in detail how and when the federal question or questions relied on for jurisdiction were raised in the state trial court and appellate court, and the way the federal questions were decided, with reference to the record as to where such

issues were raised and decided, so as to "show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." The Petition in this case ignores Rule 23(1) (f). The Petition does not specify "the stage in the proceedings . . . and the manner in which, the federal questions sought to be reviewed were raised." The Petition does not set out the method by which any federal question was raised, the "way in which they were passed upon by the court," and makes no reference to any places in the record where federal questions were raised or disposed of in the courts below. Petitioners wholly fail to set out facts in their Petition which show the existence of a federal question which was raised by them, decided against them, and thus would give this court jurisdiction over this case by writ of certiorari.

For their failure to set out any facts or arguments which raise or discuss any federal question in this case, as required by 28 U.S.C. §1257 (3) and by Rules 19(a) and 23(1)(f), this court should deny the Petition for a Writ of Certiorari for lack of a showing of jurisdiction.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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